IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Javer Chand V/s. Smt. Kuri &Ors.

S.B.CIVIL SECOND APPEAL No.81 of 1988

Date of judgment : 5th October,2006

PRESENT
HON'BLE SHRI N P GUPTA,J.

Mr.B.N.Kalla, for the appellants.
Nobody appears for the respondents, despite service.

BY THE COURT:

This appeal has been filed by the defendant, against the decree for preemption, passed by the learned lower Appellate Court.

The facts of the case are; that the plaintiff respondents filed a suit for preemption, alleging interalia that the defendant no.2 sold the property in question to the defendant no. 1(appellant) on 26.6.1978. The property sold has been detailed in para-3 of the plaint, being a house, agricultural land, a plot, other plot, and half portion of one Mahuva tree. The plaintiff claimed a right of preemption on the ground, that the wall between the

plaintiffs' house and the house sold, is common, the 'Med' of the agricultural land sold, and that of the plaintiff, is common. Likewise, the 'Pali' (Boundary) of the plot is also common. Interalia on these grounds the right of preemption was claimed.

The seller defendant remained exparte.

The purchaser defendant contested the suit, contending that the plaintiff has no property near the property sold, nor any right of easement has been sold. It was denied that the wall is joint. Likewise, 'Med', and the 'Pali' being joint was also denied. It was also pleaded that the defendant has spent huge amount on the improvement. Then an objection was raised, to the effect, that right of preemption is not applicable to agricultural lands. Interalia with these pleadings it was pleaded that the suit be dismissed.

Learned trial Court framed six issues vide order dt. 12.11.1982. First being about the plaintiffs being heirs of deceased Sawa, second being as to whether the plaintiff has a right of preemption with respect to properties described in para-3 of the plaint, and issue no. 3 was, as to whether defendant no.2 was required to give notice to the plaintiff, before selling the property to defendant no. 1. Then, issue no. 4 was, as to whether the

sale is invalid on account of defendant no. 2 being a member of Scheduled Caste. Then, issue no. 5 was about improvement, and issue no. 6 was about relief.

Learned trial court, after completing the trial, vide judgment dt. 5.1.1985 dismissed the suit. It was found by the learned trial court, that on 14.5.1981 two issues were framed, and issue no. 2 was, as to whether right of preemption is applicable to agricultural land, which issue remained undecided, and was decided by the learned trial court against the plaintiff, in view of the judgment of this Court in Sukhdev Singh's case, reported in 1981 R.R.D. (Vol. 28)-68. Then deciding issues as framed on 12.11.1982; deciding issue no.1 it was found, that the plaintiff has not produced any evidence to show, as to how she is the heir of Sawa, so much so that the plaintiff in her entire statement has not said a word, as to how she claimed to be heir of Sawa. Thus, the issue was decided against the plaintiff. Then, deciding issue no.2 it was held, that right of preemption is not attracted to agricultural lands, and regarding residential house and plots, since the plaintiff has not been able to prove her title on the adjoining lands, no right of preemption accrues to her. Then issue no. 3 was also decided against the plaintiff. Then, issue no. 4 was also decided against the plaintiff. Regarding issue no. 5 it was found, that the defendant has failed to prove any expenditure having been incurred for

improvement. Thus, this issue was decided against the defendant. In the result, the suit was dismissed.

In the appeal, the learned lower Appellate Court, vide order dt. 15.1.1987 framed additional issue, and remanded the matter to the learned trial court, under O. 41 Rule 25 C.P.C. In this order dt. 15.1.1987, the learned lower Appellate Court held, that the plaintiff no. 1 is the widow of deceased Sawa, while plaintiff no. 2 is his daughter, and thus issues no. 1 and 2 were decided in favour of the plaintiff. Then, deciding issue no. 3 also it was found, that the wall between the houses is common wall, and it was found, that the right of preemption applies to the house. Then, deciding issue no.4 it was found, that this issue has been decided on 4.2.1982, and was again decided by the learned trial court. Then, deciding issue no. 5 it was found, that the matter was required to be sent back to the learned trial court, for deciding the price of the house, inasmuch as, from out of Rs. 1500/-, for which all the properties have been sold, what was price of the house, and for this purpose the matter was remanded back.

The learned trial court after such remand returned the finding, vide order dt. 10.8.1987, that the price of the house is Rs. 750/-.

Thereafter when the appeal was taken up, it is

recorded by the learned lower appellate court, that both the learned counsel agree, that the price of the residential house is Rs. 625/-, and accordingly the suit for preemption was decreed with respect to the house only, directing the defendant to re-convey the house to the plaintiffs for a sum of Rs. 625/-.

This appeal was admitted, vide order dt. 6.1.1989, without framing any substantial question of law. However, when the matter came up, this Court vide order dt. 14.2.2005 framed substantial questions of law as under:-

> "(1) Whether the learned Appellate Judge erred in granting a decree in a suit for preemption for part of the property i.e. the residential house alone, although, a composite sale deed was executed for sale of house, agricultural land and tree standing on the land?
>
> (2) Whether the procedure adopted by the appellate court in deciding the question involved in the appeal by the judgment dated 15.1.87 and thereafter sending the question regarding valuation of house property for determination to the learned trial court can be said to be a valid exercise of jurisdiction under O. 41 Rule 25 CPC?"

I have heard the learned counsel for the appellant, and have also gone through the impugned judgments, and have gone through the record. Obviously nobody has appeared for any of the respondents, despite service.

As noticed above, it has clearly been found by the learned courts below, that the right of preemption is not available with respect to agricultural land, and rightly so. Then, a look at the finding of the learned lower Appellate Court also shows, that it has also found right of preemption, only with respect to house, and not with respect to any other property.

In my view, the right of preemption is a right of substitution, in the place of the purchaser, and not right of re-purchase, i.e. preemptor takes the entire bargain, and steps into the shoes of original vendee. Obviously, therefore, the preemptor has no right to preempt a share only, in the property sold. The consequence is, that if right of preemption is not available with respect to some of the properties, sold in the composite transaction, the preemptor cannot be allowed to preempt the rest of the property, by asking the Court to go into the question, as to about the proportionate price of the remaining property. The entire sale is to be preempted whole hog. In that view of the matter, in my view, the first question formulated is required to be answered in favour of the appellant, and is accordingly answered, and it is held that on the findings recorded by the learned lower Appellate Court, since the plaintiff does not have the right of preemption with respect to all other properties, except the house only, the decree for preemption cannot be granted.

In view of my conclusion, arrived at with respect to question no.1, the question no.2 becomes only academic. If I were to make certain observations in this regard for the guidance of the learned Judge below, that also is of no purpose, as by now the learned officer has already retired. In that view of the matter, I do not stand advised to decide question no.2.

The net result is that the appeal is allowed. The impugned judgment is set aside, and the suit for preemption is dismissed. Parties shall bear their own costs throughout.

(N P GUPTA),J.

/Sushil/